United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 15-0378**
	)	**Issued: August 17, 2016**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION FACILITY, Clarksburg, WV, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 9, 2014 appellant, through counsel, filed a timely appeal from an October 9, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established an injury in the performance of duty on May 27, 2013.

FACTUAL HISTORY

On June 10, 2013 appellant, then a 59-year-old distribution operations supervisor, filed a traumatic injury claim (Form CA-1) alleging a back injury in the performance of duty on May 27, 2013.[3] By letter dated June 11, 2013, OWCP requested that he respond to questions regarding the alleged incident and any medical treatment.

Appellant submitted a June 4, 2013 e-mail to the employing establishment. He reported that he was walking toward the flat sorter machine when he suddenly experienced intense back pain. Appellant indicated that he went to the hospital and underwent back surgery.

Appellant also submitted a form report (Form CA-20) dated June 5, 2013 from Dr. Bill Underwood, a Board-certified neurosurgeon, diagnosing lumbar disc herniation and radiculopathy. Dr. Underwood checked a box marked "yes" that the conditions were employment related, stating that appellant was walking at work and developed back pain. Appellant also submitted a duty status report (Form CA-17) from Dr. Underwood dated June 14, 2013, indicating that appellant was disabled from work.

In a report dated June 17, 2013, Dr. Dominick Woofter, Board-certified in family medicine, indicated that appellant was seen for low back pain. He stated that the etiology was spinal stenosis and disc herniation, for which appellant had surgery. Dr. Woofter opined that appellant's condition was longstanding, but that he had an acute flare up. He provided results on examination and diagnosed lumbar radiculopathy, degenerative disc disease, and foraminal stenosis at L5-S1.

By decision dated July 15, 2013, OWCP denied the claim for compensation. It found that appellant had not properly responded to the request for factual information.

Appellant requested reconsideration by letter dated July 11, 2014. He submitted a June 21, 2013 statement explaining that on May 27, 2013 he was walking toward the flat sorter machine, and he turned his head to look both ways down aisles before crossing over into the area and may have twisted to look behind him. Appellant indicated that he was not lifting, carrying, or bending.

The medical evidence included a hospital report dated May 27, 2013 from Dr. Woofter, which indicated that appellant had been seen for severe low back pain in the emergency room on May 15, 2013. By report dated June 4, 2013, Dr. Underwood diagnosed L3-4 herniated disc and performed a right sided L3-4 discectomy.

[3] The claim form initially provided a date of injury of June 27, 2013, but the reverse of the form indicated that the alleged date of injury was May 27, 2013.

In an undated report received on July 11, 2014, Dr. Woofter noted longstanding back pain since the 1970's, with a flare up of lumbar radiculopathy in May 2013. He stated that appellant had a great acceleration of his back pain while at work that led to hospitalization and surgery. By report dated September 9, 2013, Dr. Underwood found that appellant could work light duty, but in a report dated February 19, 2014, Dr. Russell Biundo, a Board-certified physiatrist, stated that appellant had a herniated disc and was unable to work.

By decision dated October 9, 2014, OWCP reviewed the case on its merits. It found that appellant had not identified a definitive employment factor as to the incident. OWCP also stated that the medical evidence was insufficient to establish the claim.

LEGAL PRECEDENT

FECA provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[4] The phrase "sustained while in the performance of duty" in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment."[5] An employee seeking benefits under FECA has the burden of establishing that he or she sustained an injury while in the performance of duty.[6] In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.[7]

OWCP's procedures recognize that a claim may be accepted without a medical report when the condition is a minor one which can be identified on visual inspection.[8] In clear-cut traumatic injury claims, such as a fall resulting in a broken arm, a physician's affirmative statement is sufficient and no rationalized opinion on causal relationship is needed. In all other traumatic injury claims, a rationalized medical opinion supporting causal relationship is required.[9]

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is

[4] 5 U.S.C. § 8102(a).

[5] *Valerie C. Boward*, 50 ECAB 126 (1998).

[6] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

[7] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(c) (January 2013).

[9] *Id.*, at Chapter 2.805.3(d) (January 2013).

determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[10]

ANALYSIS

In the present case, appellant alleged on his CA-1 form that on Monday, May 27, 2013 he was walking toward a flat sorting machine when he sustained an onset of severe back pain. There were no witnesses to the event. Appellant indicated that he did not lift, bend, or stoop. The employing establishment in a June 10, 2013 letter to OWCP indicated that his statement gave no indication that the injury was brought on by anything work related. Appellant was not lifting, bending, or stooping, but simply walking. Later, on June 21, 2013 in a statement he reported that while walking towards the flat sorter machine he was hit with an intense amount of pain. Appellant added that he looked down both aisles and "may have twisted to look behind me," but all he could remember clearly was the pain. In his admission note, Dr. Woofter reported that appellant was seen about two weeks prior suffering with acute low back pain. He noted that appellant was off work since that time until Saturday, May 25, 2013 and that appellant went into work Sunday night and Monday morning and had a sudden onset of pain. Dr. Woofter made no mention of how the injury occurred.

Given the reported facts, the Board finds that appellant has failed to supply an adequate description of the alleged incident that caused his back pain. The evidence does not present a clear picture of the incident that is alleged to have caused an injury. Particularly concerning is the evolving description of the injury, first, just walking, followed later by looking down the aisles and the fact that appellant "may have twisted his body." Lastly, Dr. Woofter is silent as to how the injury occurred.

Such inconsistencies in the evidence are sufficient to cast doubt on the validity of appellant's injury claim. They cast doubt on whether he injured himself as alleged. For these reasons, the Board finds that appellant has not met his burden of proof to establish that he experienced a specific event, incident, or exposure occurring at the time, place, and in the manner alleged. The Board will therefore affirm the October 19, 2014 decision.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established an injury in the performance of duty on May 27, 2013.

[10] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 9, 2014 is affirmed.

Issued: August 17, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board